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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Applications Of	)	WT DOCKET NO. 96-41	
	)		
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	717325	NEW

To: Administrative Law Judge Richard L. Sippel

MOTION TO DELETE ISSUE PURSUANT TO 47 C.F.R. § 1.229

Pursuant to 47 C.F.R. § 1.229, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc., hereby moves to delete that portion of the Hearing Designation Order and Notice of Opportunity for Hearing released on March 5, 1996 alleging a failure of Liberty Cable Co., Inc. to apply for and obtain a cable franchise.

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INTRODUCTION

On March 5, 1996, the Federal Communications Commission (the "FCC") issued a Hearing Designation Order and Notice of Opportunity for Hearing ("HDO") regarding the above-captioned applications of Liberty Cable Co., Inc, ("Liberty") for construction and operation of private operational fixed microwave service ("OFS") facilities in New York, New York.

Three issues were designated for hearing in the HDO, pursuant to 47 U.S.C. § 309: (1) Liberty's alleged failure to obtain a franchise to operate a cable system; (2) Liberty's operation of OFS facilities without prior FCC authorization; and (3) Liberty's alleged lack of candor before the FCC. This motion seeks to delete only those allegations relating to Liberty's alleged failure to obtain a cable franchise in New York City.[1] The HDO makes no reference at all to the fact that no franchise was available for Liberty to obtain, despite the citation in the HDO to the reported decision documenting the unavailability of a franchise procedure. HDO ¶ 5.

As detailed below, it was impossible for Liberty to obtain a franchise throughout the entire period at issue in the HDO, because no procedure for obtaining a franchise was available from the local franchising authority, New York City's Department of Information Technology and Telecommunications ("DOITT" or the "City"). Indeed, DOITT did not even begin the process of defining procedures for Liberty to obtain a cable franchise until November 13, 1995, well after Liberty instituted a lawsuit in 1994 challenging the constitutionality of the franchising requirement as applied to Liberty's system configurations, which operated entirely on private

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[1] At this time, we do not move with respect to the allegedly unauthorized "hardwire" interconnection between Lincoln Harbor Yacht Club and 600 Harbor Blvd. (FCC File Number 713300).

property. Moreover, in enacting the Telecommunications Act of 1996 (the "1996 Act"), Congress followed the recommendation of the FCC itself by reforming the definition of "cable system" to exempt video program providers like Liberty from any franchise requirement. As noted in the HDO at ¶ 12, "[b]ecause Liberty apparently does not use any public rights-of-way, the connections between non-commonly owned buildings would no longer classify Liberty as a cable operator." The issue is thus mooted prospectively.

Liberty's compliance with any alleged obligation to obtain a franchise was frustrated and hindered under the following circumstances: First, NYSCC and DOITT vacillated about the need for Liberty to obtain a franchise as a satellite master antenna ("SMATV") operator which transmitted without use of any public property or rights-of-way.[2] At the same time, NYSCC and DOITT made it impossible for Liberty to comply by failing to provide any franchise application procedures for private SMATV operators.

The uncertain legal climate at the local franchising level was paralleled at the federal level. When a new definition of "cable system" was enacted through the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), the FCC affirmatively declined to enforce a franchise requirement against private SMATV operators, like Liberty. Only after a broad ruling from a federal district court in North Dakota which would have required all wireless cable operators, including private SMATV operators, to apply for a franchise[3] did the FCC issue definitional

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[2] For convenience, a SMATV operator which, like Liberty, provides multichannel video programming services without crossing public property or rights-of-way shall be referred to hereinafter as a "private SMATV operator."

[3] *City of Fargo v. Prime Time, Inc.*, Case No. A 3-87-47 (D.N.D. March 28, 1988) (unpublished).

rules clarifying what constituted a "cable system." *In re Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990). However, the FCC's action did not create clear guidance in this muddy area. Instead, the FCC's definition faced an immediate and initially successful challenge to the inclusion of SMATV operators in the definition of "cable system."[4] Thus, while this controversy worked its way through the courts for a number of years, the constitutionality and legality of a cable franchise requirement was unsettled.

During this period of considerable legal uncertainty, Liberty began constructing its various configuration for SMATV transmission using only private property. Liberty did so in reliance upon local authority stating that private SMATV operators, like Liberty, did not need to apply for a franchise. Most significantly, no franchise application procedures existed for private SMATV operators. When DOITT changed its previous position and required Liberty to apply for a franchise even though Liberty used no public property, Liberty sought to apply. When Liberty learned that no applicable franchise application procedure existed, Liberty initiated legal action to clarify its obligations. Only well after litigation was commenced did DOITT begin to issue procedures for private SMATV operators. By then, the 1996 Act was passed, incorporating the FCC's recommendation that the definition of "cable system" be modified to exempt private SMATV operators from franchise requirements. This reform is consistent with the FCC's longstanding policy goal of encouraging and enhancing competition in the provision of video programming, thereby breaking the monopolistic stranglehold of the entrenched cable franchises. The legal landscape has thus shifted so that Liberty's obligation to apply for a franchise has now

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[4] *Beach Communications, Inc. v. F.C.C.*, 965 F.2d 1103 (D.C. Cir. 1992), *rev'd*, 508 U.S. 307 (1993), *petition for review dismissed on remand*, 10 F.3d 911 (1993).

been definitively obviated.

Liberty should not now be punished for failing to meet a franchise requirement that did not exist for private SMATV operators in New York City. Now that procedure need not be met because of the changes implemented by the 1996 Act. Since competition in the market for provision of multichannel video programming will be enhanced going forward, Liberty submits that the public interest is disserved by expending strained FCC resources litigating an issue that in fairness should never have been designated in the first place. Accordingly, for the reasons set forth below and pursuant to 47 C.F.R. § 1.229, the first issue regarding Liberty's alleged failure to apply for a cable franchise should be deleted from the HDO.

THE REGULATORY FRAMEWORK

The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* grants the FCC authority to regulate television broadcasting, a power which is now recognized to include the regulation of cable television. "Traditional" cable television systems use large remote antennae to capture television signals which are delivered to subscribers by coaxial or fiber-optical cable running on, over or under public property. The FCC requires the "cable operator" of such a traditional "cable system" to obtain a franchise from a state or municipal "franchising authority." *See* 47 U.S.C. §§ 522(6); 522(7); 522(9); 522(10) and 541.

In New York State, a municipality has the initial authority to issue a franchise, which then must be confirmed by NYSCC.[5] *New York Executive Law*, § 819. In New York City, the

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[5] NYSCC's responsibilities were assumed by the state's Public Service Commission (PSC) effective January 1, 1996. Since NYSCC was a franchising authority during much of the relevant time period, we refer here to NYSCC rather than the PSC.

municipal franchising agency is DOITT, which was formerly called the Department of Telecommunications and Energy.

Liberty's SMATV system, in contrast to a "traditional" cable system, utilizes a reception antenna or "receive only earth station" installed on the roof of a multiple unit dwelling. This antenna receives television signals transmitted by satellite or microwave, which are then transmitted by cable to individual residents of the building (and sometimes to residents of other proximate buildings).

The 1984 Cable Act defined a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ." 47 U.S.C. § 522(7). Specifically excluded from the definition of a cable system was "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility of facilities uses any public right-of-way . . . ." *Id.* at § 522(7)(B). Significantly, the legislative history of the 1984 Act defines this exemption as

> a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings (in other words, a satellite master antenna system), *unless such facility or facilities use a public right-of-way.*

1984 U.S.C.C.A.N. 4681 (emphasis added).

In implementing rules under the 1984 Cable Act, the FCC adopted the Act's definition and exclusions. In so doing, the FCC expressly found that "[w]ith regard to the exclusion of facilities that use public rights-of-way." *Cable Communications Act Rules*, 58 R.R.2d 1, 11

(1985), *modified*, 104, F.C.C.2d 386 (1986), *aff'd in part and rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). On reconsideration, the Commission further clarified that "[w]hen multiple dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now crossing of the public rights-of-way, not the ownership, control or management." *Cable Communications Act Rules Reconsideration*, 104 F.C.C.2d at 396-397.[6]

LIBERTY'S SMATV SERVICE AS A NON-TRADITIONAL AND COMPETITIVE ALTERNATIVE TO CABLE TELEVISION MONOPOLISTS

In 1986, during the period when the FCC's rules supported the conclusion that private SMATV operators, Liberty began providing multichannel video programming services in New York City by installing SMATV systems at the Normandie Court apartment complex on East 95th Street in Manhattan and the Windsor Court apartment complex on East 34th Street in Manhattan. Liberty's service has since grown to cover about 150 buildings and 30,000 subscribers. Liberty's program offerings are similar to those of the traditional franchised cable systems with which it competes, including Continental Cablevision, Tele-Communications, Inc., Cablevision Systems, Inc., Comcast Corp., and Time Warner Cable. Yet, as a private SMATV operator, Liberty offers similar programs at substantially lower rates to subscribers in New York City and surrounding areas.

Liberty is not using any New York City public property or right-of-way. Rather, Liberty

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[6] After its implementation of the 1984 Cable Act, the FCC continued to maintain this interpretation of the SMATV exemption to the definition of cable system. *See, e.g., Ira C. Stein*, 1986 FCC LEXIS 3892 at n.2 ("It should be noted that the Cable Act only requires SMATV systems using public rights of way to obtain franchises.").

receives satellite and broadcast television signals at its various "head end" facilities. Liberty then processes these television signals at the head end and distributes them either in the building directly or over microwave to reception antennae located in other buildings.

Liberty operates this microwave-based SMATV system in the 18 GHz portion of the spectrum. Liberty's pioneer venture into 18 GHz cable service has grown into one of the few viable competitive alternatives to the pervasive and seemingly intractable cable monopoly.

Liberty's microwave reception antennae, located on the rooftops of multiple unit dwellings in New York City, deliver multichannel video programming service to building residents using three configurations: the "Stand Alone System," the "Common System" and the "Non-Common System." None of these configurations use public property.

In the "Stand Alone System" configuration, Liberty utilizes a single microwave reception antenna to deliver multichannel video programming service to the residents of the single building where the antenna is located. In the "Common System" configuration, Liberty utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver multi-channel video programming service to two or more proximate multiple unit buildings under common ownership, control or management. Coaxial cable is used to link the building with the antenna to the other buildings, without using public property. No local or federal regulatory body has taken the position that the "Stand Alone System" or "Common System" configurations were subject to a franchise requirement, because these configurations both fell within the private cable exemption under the 1984 Cable Act.

In the "Non-Common System" configuration, Liberty utilizes a single microwave

reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more multiple unit buildings located nearby which are not commonly owned, controlled or managed. As with the Common System configuration, coaxial cable is used to link the building with the antenna to the other buildings, *without using public property*. These Non-Common Systems are what the FCC now claims to be subject to a so-called "cable franchise requirement." HDO § III.A.

DOITT'S LACK OF FRANCHISE PROCEDURES FOR PRIVATE SMATV OPERATORS LIKE LIBERTY

Liberty constructed its Non-Common Systems primarily during the period from the end of 1992 to Fall 1994.[7] During this period, DOITT took the position that a private SMATV operator was not required to obtain a franchise, and would not even qualify to apply for a franchise. This DOITT policy was adopted and explicitly articulated in response to the application of the Russian American Broadcasting Company ("RABC"), which on December 23, 1991 applied to DOITT for a cable television franchise to provide satellite television programming using a system identical to Liberty's Non-Common Systems. RABC sought a franchise to link by cable, *without using public property*, several multiple unit buildings not under common ownership, control or management.

On April 27, 1992, DOITT advised RABC that it did not need either a franchise or the consent of the City of New York to provide cable service to numerous multiple unit buildings in a system configuration identical to Liberty's Non-Common Systems. DOITT stated that no

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[7] Liberty constructed a Non-Common System in February 1995 during the pendency of the temporary restraining order granted by the Southern District of New York preventing enforcement of NYSCC's standstill order.

franchise was either required or available because there was no proposed use of the "inalienable property of the City for private or public purposes."

On or about May 27, 1994, Time Warner, Liberty's competitor in Manhattan, complained to NYSCC that Liberty's Non-Common Systems required a City franchise in order to continue operating. On August 23, 1994, NYSCC issued an Order to Show Cause, responsive to Time Warner's complaint, requiring Liberty to show cause why it must not either (i) obtain a franchise for the Non-Common Systems; or (ii) alternatively, terminate these video programming services by disconnecting the cable between the multiple unit buildings in these Non-Common Systems. This was the first action taken by any local franchising authority to enforce a franchise application requirement against a private SMATV operator. By then, in reliance upon the RABC decision, Liberty had constructed most of the hardwire connections named in the HDO.

Faced with this ultimatum, Liberty thereafter sought to obtain City franchises for the Non-Common Systems at issue. The only procedure for the City to grant cable franchises in addition to those previously granted to Liberty's competitors, Cablevision and Time Warner, was set forth in Resolution No. 1639, adopted by the City Council on October 13, 1993 ("Resolution 1639").

Resolution 1639 authorizes DOITT "to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment *on, over, and under the inalienable property of the City of New York.*" (Emphasis supplied.) Since none of Liberty's systems go on, over or under the inalienable property of the City of New York, Resolution 1639 was inapplicable to Liberty. Therefore, no procedure or

mechanism was in place under New York City law whereby Liberty could obtain a cable television franchise.

In October 1994, DOITT informed Liberty that Resolution 1639 required an applicant for a cable franchise to submit a bid in response to a DOITT request for proposal ("RFP"). However, as of October 1994, no RFP applicable to any of Liberty's systems had been prepared. Nonetheless, DOITT abandoned the rationale of the RABC Decision, *i.e.*, that only systems which use City property qualify for and require a City cable franchise.

On November 18, 1994, NYSCC ordered a hearing on its Order to Show Cause to commence on December 9, 1994. At the hearing, NYSCC issued a "standstill order" prohibiting Liberty from serving *new* subscribers through Non-Common Systems. No action was taken with respect to existing Non-Common Systems.

By the actions of local and state regulatory authorities, Liberty was placed in the untenable position of being told by the City and the State that Liberty had to apply for a franchise for its Non-Common Systems but not being able to do so because the City had no procedures or mechanisms to enable Liberty to apply for and obtain a franchise.

Having been placed in this Kafka-esque predicament by the City and the State, Liberty filed suit against the City, NYSCC, DOITT and others. *Liberty Cable Co., Inc. v. City of New York*, 893 F. Supp. 191 (S.D.N.Y.), *aff'd*, 60 F.3d 961 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3623 (March 15, 1996). Liberty sought to enjoin the Defendants from enforcing NYSCC's standstill order and from limiting Liberty's ability to serve its customers via the Non-Common Systems. In particular, to the extent Defendants required Liberty to obtain a franchise to serve

the Non-Common Systems, Liberty raised constitutional objections on First Amendment and due process grounds. The due process challenge was premised on Liberty's being required to obtain a cable franchise when no procedures existed whereby Liberty could do so.

The suit initiated by Liberty against the City, NYSCC, DOITT and others did not resolve the constitutional questions because the case was dismissed on grounds of ripeness. However, Liberty's action did result in the application of sufficient judicial pressure such that DOITT finally began to establish procedures pursuant to which non-traditional cable providers like Liberty could obtain a cable franchise.[8] The Second Circuit also recognized the absence of an established procedure for Liberty to obtain a franchise. As stated in the opinion, the City did not undertake to even begin a rulemaking proceeding until February 1995, four months after Liberty first applied for a franchise. Not until November 13, 1995 did DOITT issue an RFP whereby Liberty could finally begin applying for a franchise. By then, the enactment of the 1996 Act was imminent. Thus, without the compulsion of litigation, the City probably would have persisted in dragging its feet and leaving Liberty in the "Catch-22" position of having to obtain a franchise that was not available. As a result, Liberty finds itself today in the same legal environment that prevailed in April 1992: It does not need to apply for a franchise to provide SMATV service, without using public property, to non-commonly owned multiple unit dwellings interconnected by hardwire.

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[8] *Liberty Cable*, 60 F.3d at 963. The Second Circuit corrected the district court's erroneous finding that a franchise procedure was in place when, in fact, no such procedure existed when the suit was first filed at the end of 1994.

LEGAL AND CONSTITUTIONAL CHALLENGES TO THE STATUTORY DEFINITION OF A CABLE SYSTEM

The City's failure to provide for a franchise process for private SMATV operators can be best understood in the context of the constantly shifting federal definition of a cable system required to obtain a local franchise. Indeed, while the FCC until 1990 expressly exempted SMATV systems that do not use a public right-of-way from the cable system franchise requirement, the FCC abandoned this position in 1990, spawning a series of appellate decisions that first reversed the FCC's decision, but ultimately affirmed it. Even then, this core definitional issue was not finally resolved -- and the rights and responsibilities of Liberty and the City were not certain -- until some three years later.

The FCC's initial position was that the 1984 Cable Act only distinguished cable systems from other video programming distributors based on crossing of public property and rights-of-way. In 1988, a federal district court found -- over the strenuous objection of the FCC in its Amicus Curiae brief -- that the delivery by infrared (wireless) transmissions of video programming to multiple unit dwellings that were not commonly owned, controlled or managed rendered the facilities involved a cable system within the meaning of § 522(7) of the 1984 Cable Act. *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 slip op. (D.N.D. March 28, 1988). In the wake of *Fargo*, the FCC initiated a rulemaking to re-examine its interpretation of the status in order to avoid the "potential adverse effect of disparate" options of courts "on fundamental definitional questions," and "to provide certainty and uniformity in this area." *In re Definition of*

a Cable Television System, 4 FCC Rcd 2088, 2088 (1989) (Notice of Proposed Rulemaking).[9] Despite the FCC's intentions, final certainty on this core definitional issue was not provided until late 1993.

In 1990, the FCC ruled that a SMATV system serving more than one multiple unit dwelling by a closed transmission path (i.e., a wire) will be classified as a cable system, even if no public right-of-ways are used, if the buildings served are not under common ownership, management, or control. *In re Definition of a Cable System*, 5 FCC Red 7638 (1990) (Report and Order). This decision was overturned and remanded to the FCC on the grounds that the statutory definition violated the implied equal protection guarantee of the due process clause. *Beach Communications Inc. v. FCC*, 959 F.2d 975 (D.C. Cir. 1991) (no rational basis for distinction in law not requiring a franchise for SMATV systems that do not use public rights-of-way and serve commonly owned buildings, but requiring a franchise for SMATV systems that do not use public rights-of-way but serve non-commonly owned buildings). On remand, the FCC itself was unable to provide any justification for this distinction. Accordingly, the D.C. Circuit voided the franchise requirement as applied to private SMATV operators. *Beach Communications, Inc. v. FCC*, 965 F.2d 1103, 1104 (D.C. Cir. 1992).

However, the Supreme Court in 1993 reversed and remanded the D.C. Circuit's decision, upholding the 1984 Cable Act's definition of a cable system as supported by a plausible rational basis. *Beach Communications, Inc. v. FCC*, 508 U.S. 307 (1993). On remand, the D.C. Circuit

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[9] *See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 67 R.R.2d 1771, 1804 (1990) (SMATV distributors have "faced problems due to . . . unsettled questions of law concerning the requirement to obtain a local franchise.")

rejected remaining objections to the FCC's 1990 decision, finally resolving the definitional issue, at least on equal protection grounds.

In the wake of *Beach Communications*, which maintained the statutory definition, the FCC nevertheless advised Congress to revise the definition of a cable system to correspond to the interpretation of the 1984 Cable Act originally advanced by the FCC:

> The Commission recommends that Congress consider modifying 47 U.S.C. Section 522(7)(b) so as to exclude form the definition of a "cable system" not only commonly owned, but also separate-owned, dwellings interconnected by wires which do not cross public rights-of-way. Such a revision would promote the growth of wireless cable and SMATV systems as competitors to cable systems by substantially reducing the costs of expanding their systems.

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7558 (1994).[10] In enacting the 1996 Act, Congress modified the definition in accordance with the FCC's instructions, to achieve the FCC's longstanding policy goal of promoting SMATV competition to cable operators.

Throughout the entire relevant time period, one fact remains clear: the City did not provide any procedure by which a private SMATV operator, like Liberty, could even apply for a franchise. Liberty's qualifications to hold the OFS applications at issue in this case should not be tainted by failures not attributable to Liberty. Indeed, once DOITT issued the RFP nearly one year after Liberty commenced its litigation, Liberty expended the time, resources and energy to submit a response to the RFP on January 31, 1996. Shortly thereafter, the 1996 Act was signed into law, effectively exempting private SMATV operators like Liberty from having to obtain a

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[10] The FCC made this recommendation in September 1994, at around the same time that NYSCC issued its Order to Show Cause against Liberty's Non-Common Systems.

franchise.

Liberty made good-faith efforts to comply with and clarify, through wholly appropriate litigation, applicable legal obligations. Liberty's attempts and desire to obtain a cable franchise were frustrated by the total absence of procedures from state and municipal regulatory authorities. Given this history, to pursue remedies against Liberty would be manifestly unjust, especially now that Liberty's and the FCC's positions on the obligation to obtain a franchise by private SMATV operators has been vindicated through legislation.

CONCLUSION

Based on the foregoing, Liberty respectfully requests that the issue of Liberty's interconnection by hardwire of non-commonly owned buildings without a franchise be deleted from the HDO pursuant to 47 C.F.R. § 1.229.

Dated: New York, New York
April 8, 1996

CONSTANTINE & PARTNERS

By: Robert L. Begleiter

Robert L. Begleiter
Eliot Spitzer
Yang Chen
909 Third Avenue
New York, New York 10022

- and -

WILEY, REIN & FIELDING
Robert L. Pettit
Michael K. Baker
Bryan N. Tramont
1776 K Street N.W.
Washington, D.C.

Attorneys for
Bartholdi Cable Company, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20544

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	)	717325	(NEW)

DECLARATION OF PETER O. PRICE

I declare under penalty of perjury that the foreging is true and correct.

Dated: April 8, 1996
New York, New York

By:

Peter O. Price
BARTHOLDI CABLE COMPANY, INC.
f/k/a Liberty Cable Company, Inc.
575 Madison Avenue
New York, New York 10022

CERTIFICATE OF SERVICE

I, A. Everlice Sanchez, of Constantine & Partners, certify that I have, on this 8th day of April, 1996, transmitted by facsimile and sent by regular First Class United States mail, copies of the foregoing *Motion to Delete Issue Pursuant to 47 C.F.R. § 1.229* to:

Joseph Paul Weber, Esq.
Katherine C. Power, Esq.
Mark L. Keam, Esq.
Wireless Telecommunications Bureau
Enforcement Division
2025 M Street, N.W., Room 8308
Washington, D.C. 20554
Facsimile: (202) 418-2644

Arthur H. Harding, Esq.
Fleishman and Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036
Facsimile: (202) 745-0916
(Counsel for Time Warner Cable & Paragon)

Christopher A. Holt, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
Facsimile: (202) 434-7400
(Counsel for Cablevision of New York City)

Dated: New York, New York
April 8, 1996

A. Everlice Sanchez

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